(c) [not applicable]

(d) [not applicable]

(e) allow the petition to be amended or withdrawn and

(f) give such direction to the proceedings as the court thinks fit and also confer on this court the power to cure any irregularities that would not cause any injustice to the company.

allows this court to cure what I may say is merely a technical error which does no injustice to the respondents. In view of the above I will allow an extension of time to the petitioner to reswear an affidavit to verify the facts and the filing and serving of such affidavit before the hearing of this petition. The Company is of course entitled to costs and I do order that costs of the proceedings up to the date of this judgement shall be paid by the petitioner to the Company.

Order accordingly.

Solicitors: *Lim Huck Aik & Co.; Francis Nathar & Co.*

PUBLIC PROSECUTOR v. LAU HUI TECK

[R. Cr. J. (Chong Siew Fai J.) September 3, 1987]
[Sibu – Criminal Revision No. 2 of 1987]

Criminal Procedure – Plea of guilt – Withdrawal of – Same magistrate – Whether magistrate functus officio.

The accused was charged with the offence of housebreaking by night in order to commit theft. He pleaded guilty to the charge, admitted the facts given by the prosecution and was convicted.

Thereafter, after an adjournment, the accused wanted to withdraw his plea of guilt. The learned trial magistrate, however, considered himself *functus officio* by reason of the fact that he had, on the admission of the accused as to the facts outlined by the prosecution, found the accused guilty and convicted him of the offence charged.

The issue before the court was whether on the facts and circumstances of the case, the learned trial magistrate was *functus officio* in that he was powerless in allowing the change of the plea from that of guilty to one of "not guilty".

Held: on the authorities, the learned trial magistrate in the instant case was not *functus officio* and had the discretionary power to allow the change of the plea to one of not guilty.

Cases referred to:

(1) *Abdul Mormin* v. *Public Prosecutor* [1939] M.L.J. 323.

(2) *Public Prosecutor* v. *Sam Kim Kai* [1960] M.L.J. 267.

(3) *S.* v. *Recorder of Manchester* [1971] A.C. 481 H.L.

(4) *R.* v. *McNally* [1954] 2 All E.R. 372.

(5) *R.* v. *South Sefton Justices, ex p. Rabaca* (1986) *Times*, February 20.

CRIMINAL REVISION.

Parties did not appear.

Cur. Adv. Vult.

Chong Siew Fai J.: This Sibu Magistrates' Court Criminal Case No. 79/87 comes before me by way of revision as a result of a letter from the learned trial magistrate. Upon perusal of the notes of proceedings, I do not consider it necessary to hear either party to the case.

The facts giving rise to this revision are short and simple. The accused, who was then unrepresented, was charged with the offence of housebreaking by night in order to commit theft. He pleaded guilty to the charge, admitted the facts given by the prosecution and was convicted. He then pleaded in mitigation. As the prosecuting officer required time to obtain his record of previous convictions, the case was adjourned to another date.

On the adjourned date, the accused was represented by counsel who applied for an adjournment, indicating that his client would withdraw the plea of guilty and that he needed time to submit the law on the point of withdrawal of the plea. The case was further adjourned.

At the resumption of the hearing, counsel for the defence submitted on question of law and used an affidavit made by the accused. The prosecuting officer did not object to the application for withdrawal of the plea. I find it unnecessary here to deal with the contents of the affidavit save saying that the learned trial magistrate, after hearing counsel, appeared inclined to allow the withdrawal of the guilty plea on the apparent grounds that the accused, as stated by himself, could have failed to fully understand the charge owing to confusion and scare after a five-day remand, and that the evidence of entry necessary to constitute the alleged offence was lacking. However, the learned trial magistrate considered himself *functus officio* by reason of the fact that he had, on the admission of the accused as to the facts outlined by the prosecution, found the accused guilty and convicted him of the offence charged.

The question therefore may be thus put: On the facts and circumstances of the case as stated above, was the learned trial magistrate *functus officio* in that he was powerless in allowing the change of the plea from that of guilty to one of not guilty?

Abdul Mormin v. *Public Prosecutor*[1] shows that in a proper case, the withdrawal of a plea of guilty is permissible at the stage of mitigation. Poyser C.J. said:

"It may be, too, that a plea in mitigation raises complicated questions of fact on which it is necessary to take evidence. In such a case the court may find it more convenient to try the case as a whole and we see no reason why a plea of not guilty should not be substituted for the plea of guilty ... it is only fair to an accused person that he should have an opportunity of having the truth of allegations in his favour properly investigated, and it is only fair to the Crown that it should have an opportunity of meeting those allegations, and it is right that the court should ascertain the truth or otherwise of the allegations in the manner most convenient to it."

The following passages in the speech of Rigby J. in *Public Prosecutor* v. *Sam Kim Kai*[2] at p. 267, albeit *obiter dictum*, are illustrative of the situation in the present case:

"The respondent was originally charged with the main offence of housebreaking. To that charge he pleaded guilty. The learned President, before passing sentence upon him, perfectly properly remanded him in custody with a view to obtaining a report upon him from the Probation Officer. When the matter again came before him seven days later, the respondent was represented by an advocate, Mr. Triptipal Singh, who informed the court that his client wished to withdraw his plea of guilty. The learned President thereupon permitted him to do so and to substitute therefor a plea of not guilty.

Now, there is, no doubt, a discretion vested in a trial court to allow an accused person, before sentence, to withdraw a plea of guilty and to substitute a plea of not guilty. But that discretion requires to be exercised judicially and for valid reasons. An accused person cannot be permitted merely at whim to change his plea, except upon valid and sufficient grounds which satisfy the magistrate that it is proper in the interests of justice that he should be allowed to do so. (See the case of *R.* v. *McNally* [1954] 2 All E.R. 372 and the cases cited in *Mallal's Criminal Procedure*, 4th Ed. pp. 254-5.)"

In *S.* v. *Recorder of Manchester*,[3] it was firmly established that a plea of guilty may be changed to one of not guilty at any time before sentence even though the plea of guilty was unequivocal. The discretion, however, must be exercised judicially. See also *R.* v. *McNally*.[4]

R. v. *South Sefton Justices, ex. p. Rabaça*[5] is a more recent English case showing that discretion exists for the change of plea after a plea of guilty and at the stage of submission on mitigation. In that case, the accused, through his solicitor, entered an unqualified guilty plea to a charge of theft of a number of items. In his mitigation, the solicitor made statements inconsistent with that plea but the justices imposed a sentence reflecting the whole rather than the part. On application by the accused for judicial review, the Queen's Bench Divisional Court, in granting the application, held that the justices had failed to detect in the mitigation material showing the inappropriateness of the plea to the whole of the charge and had not considered whether to exercise their discretion to invite a change of plea.

On the authorities, I hold that the learned trial magistrate in the instant case was not *functus officio* and had the discretionary power to allow the change of the plea to one of not guilty. The power must, of course, be exercised judiciously.

The case is remitted to the Magistrates' Court, Sibu, for continuation of the trial according to law.

Order accordingly.